



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

04-17-07
NOTICE OF APPEAL FROM THE EXAMINER
TO THE BOARD OF APPEALS

- AF/IFW

Appellant: LeMay et al.
Serial No.: 10/601,771
Filed: June 20, 2003
For: TAPERED TAMPON APPLICATOR
Examiner: Laura C. Hill
Art Unit: 3761
Confirmation No.: 7298
Customer No.: 67519 Attorney Docket: 460.2174USU

Mail Stop Appeal Brief-Patents
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We are enclosing for filing in the above-identified application the following:

1. Appellant's Reply Brief (*in triplicate*);
2. Transmittal letter in duplicate; and
3. Postcard.

Please charge any additional fees or credit any such fees, to Deposit Account No.: 162-127 in the name of Playtex Products, Inc. If necessary please charge any additional fees to Deposit Account No. 01-0467 in the name of Ohlandt, Greeley, Ruggiero & Perle. A duplicate copy of this sheet is attached.

Respectfully submitted,

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April 16, 2007

Date

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Suzanne Lombardo
(Typed name of person mailing paper)

(Signature of person mailing paper)



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Serial No.: 10/601,771
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Examiner: Hill, Laura C.
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Customer Number: 67,519

Attorney Docket No.: 460.2174USU

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Commissioner for Patents
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REPLY BRIEF FILED UNDER 37 C.F.R. §41.14

Dear Sir:

Appellants submit this Reply Brief in accordance with the provisions of 37 C.F.R.
§41.41 in response to the Examiner's Answer dated February 16, 2007.

I. STATUS OF CLAIMS

Claims 1 through 6 and 8 through 73 are subject to appeal.

Claims 1 through 6, 8 through 10, 13 through 22, 32 through 61, 63, 64, and 66 through 73 stand finally rejected under 35 U.S.C. §103(a) as being obvious over U.S. Patent Application Publication No. 2001/0056253 to Suga (hereinafter "Suga") in view of U.S. Patent No. 3,895,634 to Berger et al. (hereinafter "Berger").

Claims 11, 12, 23 through 31, 62, and 65 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Suga in view of Berger as applied to claim 1, and in further view of U.S. Patent No. 3,765,416 to Werner et al. (hereinafter "Werner").

II. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

Whether claims 1 through 6, 8 through 10, 13 through 22, 32 through 61, 63, 64, and 66 through 73 are unpatentable under 35 U.S.C. § 103(a) by U.S. Patent Application Publication No. 2001/0056253 to Suga (hereinafter "Suga") in view of U.S. Patent No. 3,895,634 to Berger et al. (hereinafter "Berger"). Whether claims 11, 12, 23 through 31, 62, and 65 are unpatentable under 35 U.S.C. § 103(a) over Suga in view of Berger as applied to claim 1, and in further view of U.S. Patent No. 3,765,416 to Werner et al. (hereinafter "Werner").

III. ARGUMENT

In response to Appellant's arguments, the Examiner's Answer introduces annotated Fig. 1 with two slanted lines extending from the tip of applicator 2 that are label "tapered tip." The Examiner's Answer asserts that Suga discloses a tapered insertion tip because this newly introduced annotated Fig. 1 exhibits an insertion tip with a shape that is defined by the broadest interpretation of the term tapered. However, this diverts attention from the issue at hand, which is whether Suga in combination with Berger discloses or suggests "a tampon applicator comprising a barrel, said barrel having a tapered insertion tip with a plurality of petals, wherein the insertion tip has a **taper ratio greater than 1 to about 8**, wherein the taper ratio is a length of a projection of the insertion tip taper along a longitudinal axis of the barrel to a length of a projection of the insertion tip taper along a radius of the barrel at a base region of the plurality of petals." Independent claims 1 and 37, and claims dependent therefrom, are in allowable condition not merely for being tapered, but for providing a taper ratio that is not disclosed or suggested by any documents known prior to the filing date of the present application.

The Examiner's Answer attempts to interpret the tip of the applicator from Suga as having the same characteristics of the insertion tip provided in claims 1 and 37 by citing the calculations on page 3 of the Office Action. However, the Office Action and the Examiner's Answer both import information from the present application in order to reach the conclusion that Suga discloses the insertion tip provided by claims 1 and 37. Specifically, Suga described general dimensions of the applicator without describing the

tapered ratio provided in claims 1 and 37. Also, the calculations offered in the Office Action provide no support for its assertions since the lengths used in the calculation are chosen arbitrarily and offer no evidence that Suga discloses or suggests the content of claims 1 and 37.

There are two lengths of projection provided in claims 1 and 37 that are used in arriving at the tapered ratio. The first length of projection is "a length of a projection of the insertion tip taper along a longitudinal axis of the barrel," and the second is "a length of a projection of the insertion tip taper along a radius of the barrel at a base region of the plurality of petals." The Examiner's Answer appears to pick any length on the Suga applicator in Fig. 2 that suits its purpose and compares it to another indiscriminately chosen length on the Suga applicator to demonstrate that Suga discloses or suggests the taper ratio provided in claims 1 and 37.

The problem is that it overlooks an important distinction between Suga and the applicator recited in claims 1 and 37, and that is that there are two specific lengths of projection that are perpendicular to each other that are compared to arrive at the claimed taper ratio. The taper ratio compares the length of a projection of the insertion tip taper along a longitudinal axis of the barrel (hereinafter "the longitudinal length") to the length of a projection of the insertion tip taper along a radius of the barrel at a base region of the plurality of petals (a length perpendicular to the longitudinal length) (See page 5 of the present application).

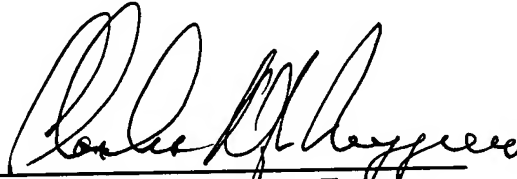
The Examiner's Answer purports that even in the "taper projection length" was defined as Applicants suggest this value would be some value less than A and the taper ratio would still fall in the range "greater than 1 to about 8." However, if the "alternative projection length," as defined in annotated Fig. 2 in the Examiner's Answer, was used in defining the taper ratio the value would be much less than one because the "alternative projection length" is smaller than B or D, i.e., "alternative projection length" / (B or D) > 1. Also, the record does not support analogizing "length A" (as shown in annotated Fig. 2 of the Examiner's Answer) to the longitudinal length of claims 1 and 37. The longitudinal length is recited in claims 1 and 37 as the length that extends along a longitudinal axis from the tip of the insertion tip to the base of the petals. "Length A," as described in the Examiner's Answer and shown in annotated Fig. 2, clearly does not extend to the tip of the insertion tip and it extends beyond the base of the petals. Thus, "Length A" is not related to the longitudinal length provided in claims 1 and 37.

Berger fails to cure any deficiency of Suga noted above. Consequently, Suga alone or in combination with Berger fails to disclose or suggest the insertion tip, and more specifically, the tip ratio recited in claims 1 and 37.

Consistent with the argument above relating to claims 1 and 37, nowhere in Suga or Berger is a tampon applicator with a tapered barrel with the taper ratio of 1.2 to about 8 disclosed or suggested.

In summary, Appellants respectfully request that the Board of Appeals reverse the final rejections of the claims and pass all of the pending claims to issuance.

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